

EXHIBIT B

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Adv. Case No. 08-01789-smb
4 - - - - - x
5 SECURITIES INVESTOR PROTECTION CORPORATION,
6 Plaintiff,
7 v.
8 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC. Et al,
9 Defendants.
10 - - - - - x
11 Adv. Case No. 09-01503-smb
12 - - - - - x
13 IRVING H. PICARD TRUSTEE FOR THE LIQUIDATION OF BERNARD L.
14 MADOFF INVESTMENT SECURITIES LLC,
15 Plaintiff,
16 v.
17 MADOFF, et al,
18 Defendants.
19 - - - - - x
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1 Adv. Case No. 10-04285-smb

2 - - - - - x

3 IRVING H. PICARD TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

4 MADOFF INVESTMENT SECURITIES LLC,

5 Plaintiff,

6 v.

7 UBS AG, UBS (LUXEMBOURG) SA et al,

8 Defendants.

9 - - - - - x

10 Adv. Case No. 10-05311-smb

11 - - - - - x

12 IRVING H. PICARD TRUSTEE FOR THE SUBSTANTIVELY CONSOLIDATED

13 SIPA LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES

14 LLC and BERNARD L. MADOFF,

15 Plaintiff,

16 v.

17 UBS AG, UBS (LUXEMBOURG) SA et al,

18 Defendants.

19 - - - - - x

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U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004

April 27, 2016

10:00 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

1 Hearing re: 08-01789-smb Omnibus Interim Fee Applications

2

3 Hearing re: 08-01789-smb Status Conference Regarding
4 Certain Outstanding Subpoenas

5

6 Hearing re: 09-01503-smb Motion to Extend the Notice of
7 Pendency Filed Against Certain Real Property in New York
8 County Owned by Deceased Defendant Andrew H. Madoff

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10 Hearing re: 10-04285-smb Status Conference

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12 Hearing re: 10-05311-smb Status Conference

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE CLERK: Please be seated.

3 THE COURT: Good morning. Madoff?

4 MR. JACOBS: Good morning, Your Honor.

5 THE COURT: Good morning. Why don't we do the fee
6 applications, first.

7 MR. JACOBS: Oh, okay.

8 MS. BROWN: Good morning, Your Honor. Seanna
9 Brown on behalf of the Trustee. This is the return date of
10 the 20th interim fee applications by Baker Hostetler for
11 fees and expenses in connection with the Madoff liquidation.
12 In addition, we have also brought applications with regard
13 to all the counsel who work with us throughout the world on
14 the case.

15 At the outset I'd like to note that there were no
16 objections that were filed with regard to any of these
17 applications, and I'd also like to note that SIPC has
18 approved all of the fee applications here this morning.

19 I know Your Honor is fully familiar with our
20 applications and the current events in this case, so I plan
21 to do -- just give a very brief overview of where we are and
22 then I will also defer to Mr. Bell who will speak on behalf
23 of SIPC.

24 Starting with the good faith cases. As Your Honor
25 knows we filed over 900 good faith cases during the course

1 of this proceeding, we have resolve the majority of these
2 cases by settlement or dismissal, bringing the current
3 number of cases down to 394 and we are working to resolve
4 the remaining cases as quickly as possible.

5 With regard to the bad faith and feeder fund
6 cases, we have approximately 116 of those cases currently
7 pending, and many of those cases are involved in the
8 extraterritoriality proceedings which is currently pending
9 before Your Honor.

10 With claims objections, we have approximately
11 1,100 claims objections remaining as of April 15th. In
12 January, this Court's order on the trustee's sixth and
13 seventh omnibus motions resolved objections related to 149
14 claims. And last month the trustee filed a motion to
15 resolve objections related to 17 indirect claims, which the
16 Court granted yesterday.

17 On settlements, we have continued to make progress
18 in reaching settlements in this case. During the
19 compensation period the trustee settled 73 cases for
20 approximately \$245 million. And the trustee also entered
21 into settlements following the compensation period that will
22 bring an additional \$226 million into the customer fund.

23 The trustee is engaged in current settlement
24 negotiations that we hope will be concluded shortly.

25 I want to briefly touch on the sixth interim

1 distribution. The trustee distributed \$1.2 billion through
2 April 26th, in connection with that distribution. In total,
3 the trustee has distributed \$9.277 billion to BLMIS
4 customers, which includes SIPC advances in the amount of
5 \$836 million. These amounts represent 56 -- I'm sorry,
6 57.064 percent of each allowed customer claim.

7 Turning to the foreign fee applications. I just
8 want to highlight four firms that make up the bulk of the
9 hours for the billing period, starting with Brown & Jacobson
10 who is our principal foreign counsel. Brown Jacobson worked
11 approximately 4,200 hours on behalf of the trustee. During
12 the compensation period Brown & Jacobson worked on the
13 Vizcaya matter, primarily in connection with the settlement
14 negotiations with the Vizcaya defendants as well as
15 preparing for a hearing before the privy counsel in London.
16 As Your Honor knows, we reached a settlement in the Vizcaya
17 matter and Brown Jacobson was instrumental to the
18 settlement. Brown & Jacobson also continues to work with
19 Baker Hostetler to prepare pleading in connection with
20 protective actions the trustee is pursuing abroad. And
21 Brown & Jacobson also advised the trustee, generally, on
22 issues of English law.

23 Soroker - Agmon is a Tel Aviv law firm that's
24 spent approximately 1,700 hours on the trustee's behalf.
25 Soroker advised the trustee on behalf -- on Israeli law and

1 also drafted two complaints related to the Magnify
2 defendants.

3 The next firm is Williams Barristers, they're in
4 Bermuda and spent approximately 420 hours on the trustee's
5 behalf. They advised the trustee on issues of Bermuda law
6 and they also monitored proceedings in the Supreme Court of
7 Bermuda relating to Kingate.

8 Last, but not least, the trustee's Gibraltar
9 counsel, Triay, Stagnetto, Neish spent approximately 350
10 hours on the trustee's behalf. They advised the trustee on
11 Gibraltar law and represented the trustee in the courts in
12 Gibraltar. They also assisted the trustee with regard to
13 the Vizcaya settlement and assisted with preparing for the
14 hearing before the privy counsel.

15 So that's the highlights of what's going on with
16 our foreign counsel.

17 And last, but not least, I would like to note that
18 our colleagues at Windels Marx have done a superior job
19 at -- throughout the case. They have been with us since the
20 beginning, and their services have been exemplary and
21 extraordinary helpful. They have gotten great results, as
22 have our other conflicts counsel, Young & Conaway.

23 The work of all these firms has been instrumental
24 to the trustee's success. In light of these submissions
25 that were made to Your Honor and having received no

1 objections, I respectfully request that Your Honor approve
2 our applications this morning.

3 THE COURT: Thank you.

4 MS. BROWN: Thank you.

5 MR. BELL: Your Honor, good morning.

6 THE COURT: Good morning.

7 MR. BELL: Kevin Bell on behalf of the Securities
8 Investor Protection Corporation. We have filed
9 recommendations in support of all the applications that have
10 been filed for compensation. We have read all of the
11 underlying time records and have made our comments on those.

12 And as reflected in just two, for example, Windels
13 Marx, at paragraph 3, together with the reduction in the
14 usual billing rate, there has been a reduction in their
15 services in the amount of about 15.09 percent. And at
16 paragraph 5 of SIPC's recommendation on Baker Hostetler and
17 trustee fees, there's been a reduction of about 13.93
18 percent from the usual billing rates, which reflect the ten
19 percent discount and taking into effect SIPC's suggestion
20 and comment.

21 As the Court knows, the standard is set forth in
22 the SIPA statute, by Congress federal law, §78eee(b) (5) (A) -
23 (5) (C). The trustee has set forth, in -- trustee in Baker
24 has set forth that there is no reasonable expectation that
25 there will be any funds for the general estate. At the last

1 hearing this Court, after SIPC's comments, talked about the
2 estate being essentially insolvent, I think that's
3 ineluctable at this moment in time.

4 But the important thing is that the services
5 rendered have been extremely helpful so that the trustee is
6 on the cusp of paying 60 cents on the dollar of each of the
7 net loser victims who has an allowed claim, which is a
8 remarkable feat in the largest financial fraud in the
9 history of this country. And the work that has been done by
10 each of these applicants has been helpful in this
11 extraordinary recovery effort. And SIPC recommends that the
12 Court enter an order approving the fees.

13 THE COURT: Thank you.

14 MR. BELL: Do you have any comments, Your Honor?

15 THE COURT: No. Let me ask, is there anyone else
16 who wants to be heard in connection with the applications?
17 The record should reflect there's no response.

18 In light of SIPC's recommendation and the fact
19 that the estate -- there's no reasonable expectation that
20 the customer estate will be solvent, I'll grant the fee
21 applications. You can submit an order. Thank you.

22 MR. BELL: Thank you, Your Honor.

23 THE COURT: All right. I'll do the rest of the
24 calendar now. First is the status conference regarding
25 outstanding subpoenas. I think this is a carryover from the

1 last conference.

2 MR. JACOBS: Good morning, Your Honor. Ted Jacobs
3 on behalf of the trustee.

4 If the Court recalls, on March 23rd we had a
5 hearing on certain motions filed by Chaitman, LLP regarding
6 Rule 45, bank subpoenas served by the trustee. In many of
7 those cases the Court denied those motions, and six of those
8 cases the Court continued that conference until today. And
9 I can provide a very brief update of where we are on each of
10 those six cases, if that pleases the Court.

11 THE COURT: Go ahead.

12 MR. JACOBS: The first is the Roth case, where Ms.
13 Roth was in the process of substituting counsel at the time
14 we had our March 23rd hearing. She -- our understanding is
15 she is now pro se, we have been in communications with her.
16 We believe that we are on track to amicably settle our
17 claims, and accordingly we are holding that subpoena in
18 abeyance, and we would like to continue this hearing for
19 approximately a month to perhaps the next omnibus date or
20 whenever the Court may deem --

21 THE COURT: When is the next omnibus date?

22 MR. JACOBS: I'm not sure, Your Honor. I believe
23 --

24 THE COURT: There's one about three weeks off, I
25 think, isn't there?

1 MR. JACOBS: Right. Perhaps we could do a date
2 after that to allow for a little bit more time, or
3 approximately 30 days when convenient for the Court.

4 THE COURT: When is the June date, do you know?

5 THE CLERK: June 15th.

6 THE COURT: June 15th?

7 MR. JACOBS: All right.

8 THE COURT: So we'll adjourn that to June 15th.

9 MR. JACOBS: Great. Thank you, Your Honor.

10 There are four additional cases. They're the
11 Shapiro cases, they're all related and involve an estate
12 which is -- which was the primary initial transferee of the
13 BLMIS account that's operative in those complaints. If Your
14 Honor recalls, the estate, at the time we served our
15 discovery, was without legal representation. They are now
16 in the process of appointing new counsel. We have been in
17 communication with them, they have been cooperative and
18 we've had fruitful discussions.

19 We have extended the return date on those
20 subpoenas until May 30th in the hopes that we can resolve
21 all of those outstanding issues. And we would similarly
22 request that the Court adjourn the hearing with respect to
23 those subpoenas until June 15th.

24 THE COURT: All right.

25 MR. JACOBS: The last case out of the six is the

1 Wilenitz matter. Just by way of background, if the Court
2 recalls, the Court had some questions about the sufficiency
3 of the defendant's RFA responses and subsequently the
4 trustee's need for bank records in that case. We had noted,
5 at the -- on the -- at the March 23rd conference that the
6 defendant -- the individual defendant, Ms. Wilenitz, had
7 submitted an affidavit in connection with her claim that was
8 filed in June 2009, in which she said that she had her bank
9 records, she had compared those to the customer statements
10 and that the BMLIS customer statements were correct.

11 So on that basis we suggested that instead of
12 pursuing the third party subpoena against the bank, that Ms.
13 Wilenitz produce those bank statements in her possession, in
14 the first instance, and the Court agreed and continued the
15 hearing on that basis.

16 Since that time we have been in touch with counsel
17 for the defendant, represented by Mr. Dexter here today. We
18 were informed, yesterday, by Ms. Chaitman, his colleague,
19 that Ms. Wilenitz in fact does not have any bank records in
20 her possession. She does have customer statements. So to
21 us that begs the question, if Ms. Wilenitz had bank
22 statements in her possession in June 2009, what has happened
23 to those documents in the interim?

24 THE COURT: Well has she conceded that the
25 transfers reflected in the trustee's schedule were made?

1 MR. JACOBS: That's the nuance of the case that I
2 think of the RFA response that was concerning the Court, and
3 I can respond to that, Your Honor.

4 The RFA responses do concede that the customer
5 statements are correct with respect to the withdrawals and
6 the defendant does admit that the amount of the withdrawal
7 is correct. However, if you -- upon a closer examination of
8 the RFA responses, later on that same defendant -- all of
9 the defendants deny that they actually received those
10 transfers.

11 THE COURT: Let me see.

12 MR. JACOBS: So there were two sets of RFA
13 responses submitted, one on behalf of Ms. Wilenitz,
14 individually, the rest on -- the others on behalf of the
15 remaining trustee defendants. And each is substantially
16 similar --

17 THE COURT: I'm looking at the trust defendant's
18 response; which paragraph are you referring to?

19 MR. JACOBS: If you'll give me just one moment.

20 THE COURT: Oh, I see here.

21 MR. JACOBS: That's the -- that's Ms. Wilenitz.
22 One second.

23 THE COURT: Oh, she denied that she received the
24 withdrawals. I see.

25 MR. JACOBS: Yes. It's --

1 THE COURT: It's number six.

2 MR. JACOBS: Yes. And number -- also request
3 number 11 is similar where the trust defendants also deny
4 that they received the \$150,000 in excess of principal.

5 In addition to that issue, Your Honor, I also note
6 there are several other responses that were made in
7 discovery that are disturbing here. In addition to
8 affirmative defenses that were raised about set off and
9 taxes paid, we also served interrogatory requests and the
10 defendants responded that they paid short term and long term
11 taxes on capital gains with respect to the fictitious
12 profits in every year that the account was maintained. That
13 was supplied affirmatively in response to a request
14 concerning the basis of that affirmative defense. So it's
15 not just the bank -- the bank records are not just relevant
16 to the receipt of the transfer issue, which is clearly
17 denied, they're also relevant to those affirmative defenses.

18 And also, we'd like to note for the record, that
19 the defendant served responses to our request for document
20 production where we requested bank records from the
21 defendant directly. In those responses the defendant stated
22 that they had contacted their banks and the banks
23 represented that those records have not been maintained.
24 However, we subpoenaed Citibank, that's the subpoena that's
25 at issue today. Citibank has a production ready to be

1 produced pending this Court's ruling on that subpoena. So
2 we have some -- I believe a possible issue of spoliation and
3 we also have some potential discovery disputes that we may
4 need to raise with the court, depending on hopefully what
5 happens after we get the production from Citibank.

6 So -- and with all of that said, Your Honor, we
7 request that the defendants withdraw their motions, if the
8 Court -- to remind the Court there's not just the motion to
9 quash the subpoena, there's also a pending motion to dismiss
10 the trustee's complaint, based on certain alleged discovery
11 --

12 THE COURT: I thought I denied that the last time.

13 MR. JACOBS: If that has been denied, then I stand
14 corrected.

15 THE COURT: I thought I read it in -- a decision
16 into the record on that.

17 MR. JACOBS: I had thought that motion had been
18 continued, together with the motion to quash, but if I'm
19 incorrect, I apologize.

20 THE COURT: I denied all the motions to dismiss.

21 MR. JACOBS: Okay. Thank you, Your Honor. Then
22 we request that the defendants withdraw their motion to
23 quash the subpoena.

24 MR. DEXTER: Good morning, Your Honor. Greg
25 Dexter, Chaitman, LLP. We have no problem withdrawing our

1 motion to quash the subpoena. The Court's order is quite
2 clear that Wilenitz would produce whatever documents she had
3 in her possession. She has no bank statements now in her
4 possession, therefore there's -- we have no choice but to
5 comply -- allow compliance with the subpoena. There are no
6 documents she can produce.

7 With respect to allegations of spoliation, there's
8 really -- they're really unfounded because the SIPC claim
9 was made in 2009 at which point we did not represent the
10 defendant and no preservation letter was sent by the trustee
11 in 2011. So presumably, between 2009 and 2011 she lost
12 track of the records, she's over 90 years old, we don't have
13 firsthand knowledge of that. And if the records don't
14 exist, there's really nothing that we can do to produce
15 them.

16 THE COURT: I got it. All right. Then I will
17 deny the motion to quash the subpoena with request to
18 Citibank. That's the only bank at issue --

19 MR. JACOBS: Yes, Your Honor.

20 THE COURT: -- with Wilenitz? All right. You can
21 submit an order and we'll carry the Roth and Shapiro matters
22 over to June 15th.

23 MR. JACOBS: Okay. Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. DEXTER: Thank you, Your Honor.

1 THE COURT: Thank you.

2 Next concerns the extension of the notice of
3 pendency.

4 MR. CAMPBELL: Good morning, Your Honor. My name
5 is Patrick Campbell and I represent the trustee in this
6 matter.

7 On April 6th the trustee filed a motion requesting
8 an extension of the notice of pendency that he caused to be
9 filed and recorded on Andrew Madoff's New York City real
10 property located at 433 East 74th Street, Apartment 5A.
11 After the parties agreed, and this Court ordered two six-
12 month extensions on the notice of pendency, that currently
13 expires on June 1st, 2016, we were not able to get the
14 defendants to agree to a further extension. And I would
15 also note that they're -- they have not filed objections to
16 this motion either.

17 THE COURT: Let me ask if there's anybody in court
18 today who wants to be heard in opposition to the motion.
19 The record should reflect there's no response.

20 The motion is granted. You can submit an order.

21 MR. CAMPBELL: Thank you, Your Honor.

22 THE COURT: Final matter concerns the status of
23 discovery in the UBS matters. Who would like to speak?

24 MS. JENSEN: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MS. JENSEN: Karin Jensen on behalf of the
2 trustee. We're here today on a status conference in order
3 to move forward with discovery. This case was filed --
4 these two cases, the first one I'll refer to as the Lux
5 action, that's 4285, and the other is 5311 that I'll refer
6 to as the LIF action. These two cases were first filed
7 in -- five and a half years ago, they're both feeder fund
8 cases where the defendants are the funds themselves, in
9 addition to a number of service providers. In the Luxalpha
10 action there are also director defendants so it's
11 structurally analogous to Kingate, which you're familiar
12 with.

13 We are -- the events at issue in the complaints
14 occurred more than 12 years ago, and I think given the
15 procedural posture of the case, we're looking at a full
16 decade after Madoff's arrest when we would be able to begin
17 discovery under the current state of affairs.

18 So we think that the first decision that's
19 relevant to these two actions is the extraterritoriality
20 decision, under that decision the feeder funds obviously, as
21 the initial transferees, will not be subject to dismissal
22 and so even if the remaining defendants who filed and
23 participated in the extraterritoriality proceedings, we will
24 still need discovery from those service provider defendants.
25 So that is the first order.

1 The second order would be a briefing on the motion
2 to amend, that pursuant to paragraph 15 of the
3 extraterritoriality order we would engage in briefing. This
4 is one of those six or eight cases where we filed full
5 proffered amended complaints, these two cases. So those are
6 attached to the extraterritoriality proceedings, the
7 briefing that we filed last June. So then we would engage
8 on motion practice on whether those two complaints should go
9 forward. And they contain new allegations, both on personal
10 jurisdiction, transfers and issues of good faith, both of
11 those complaints contain new allegations. So we would
12 expect, you know, some robust briefing on that issue.

13 And then next we have an order in this case from
14 March 8th of 2012, where we agreed that the parties would
15 proceed on personal jurisdiction before other Rule 12
16 motions. So the next round of briefing after the motion to
17 amend, and that order is granted, we would proceed to the
18 personal jurisdiction briefing.

19 THE COURT: Is the motion to amend separate from
20 the allegations relating to the extraterritoriality?

21 MS. JENSEN: The allegations relevant to the
22 decision on extraterritoriality are set forth in the
23 proffered amended complaint that's attached to the trustee's
24 submission in June. But the complaint is not yet operative,
25 because it has not been -- we have not been granted leave to

1 amend.

2 So then after personal jurisdiction is decided, we
3 also have a forum non motions in both cases brought by the
4 funds, Luxalpha and LIF.

5 And then we would proceed to the other Rule 12
6 briefing, after the personal jurisdiction.

7 THE COURT: It sounds like you're a long way from
8 the merits --

9 MS. JENSEN: Exactly.

10 THE COURT: -- if you ever get there.

11 MS. JENSEN: Exactly. And so at this point, given
12 that the events that occurred started 16 years ago in these
13 complaints, and we're looking at, you know, probably another
14 couple of years before we would get full decisions across
15 the board, a decade after Mr. Madoff's arrest, we are
16 interested in pursuing discovery now. And we think that
17 even in the event that any of these motions are granted --
18 first of all, they're not dispositive of all claims, or all
19 defendants, we believe that we would still be engaging in
20 similar discovery, if not the exact same discovery after
21 these motions are granted, given that the service providers
22 have the documents and witnesses that relate to these two
23 funds. And in addition, we have disallowance and equitable
24 subordination claims so the documents would be relevant to a
25 determination of those issues.

1 These are two -- Luxalpha and LIF are net losers
2 and they have filed claims. Both UBS SA filed claims on
3 behalf of the funds, and they filed direct claims
4 themselves. And Luxalpha is in the order of 762 million and
5 LIF is in the order of 23 million.

6 THE COURT: So what's the additional discovery,
7 beyond the discovery you need for the claims resolution and
8 the suit against the initial transferees, which presumably
9 won't go away.

10 MS. JENSEN: Right. I don't see --

11 THE COURT: Or some form of it won't go away.

12 MS. JENSEN: We -- and we have talked amongst
13 ourselves, with the defendants as well, about how that
14 discovery might look different. I cannot envision a subject
15 matter that would be carved off, even if the service
16 provider defendants are dismissed in any of these actions.

17 THE COURT: Well the issue of the subsequent
18 transfers would be carved out, wouldn't know --

19 MS. JENSEN: That would be carved off --

20 THE COURT: -- what would be relevant --

21 MS. JENSEN: -- but they have the documents that
22 supported the funds. They served the funds, they did the
23 marketing, the funds themselves are, you know --

24 THE COURT: You know, I've gotten draft case
25 management orders.

1 MS. JENSEN: Um hmm.

2 THE COURT: Has that been agreed to by the
3 parties?

4 MS. JENSEN: It's -- the terms have been agreed
5 to, generally speaking. I'll let the defendants speak for
6 themselves if they have any opposition to it. But the fact
7 of whether we proceed is the open issue.

8 THE COURT: Okay. Thank you.

9 MR. KING: Good morning, Your Honor. Marshall
10 King from Gibson Dunn & Crutcher. We represent the UBS
11 defendants.

12 Ms. Jensen recited the history fairly accurately,
13 but I think it's worth going through a little detail why
14 we're at the point where no discovery has taken place. It's
15 not that nothing has happened in these cases. We -- through
16 a series of events, both imposed by Courts and agreed by the
17 parties, we agreed to address a bunch of issues step by
18 step, these threshold issues.

19 We started with the issue of the trustee's
20 standing to pursue common law claims on behalf of customers;
21 those were briefed in the summer of 2011 and a decision was
22 rendered by the District Court in November 2011 that then
23 went up on appeal to the Second Circuit, where it was
24 affirmed and then cert was eventually denied.

25 At that same time, or following the District

1 Court's ruling, we did agree to address first, the question
2 of jurisdiction. That was briefed in 2012. Judge Lifland
3 held a -- we appeared for argument on the motions to
4 dismiss, excuse me, in December of 2012. Judge Lifland
5 converted that to a status conference, asked us to try to
6 simply -- talk and try to simplify the issues. Talks ensued
7 thereafter, for a while. Some of the issues were
8 simplified, and the trustee dismissed claims against a
9 number of the defendants, others, including one of my
10 clients, withdrew its jurisdiction motion, although others
11 remained pending.

12 We agreed that merits based 12(b)(6) motions would
13 await the outcome of the jurisdiction issue. Somewhere
14 along the way there, of course, the extraterritoriality
15 proceedings intervened. Most of the defendants in these two
16 cases joined those proceedings, and Your Honor knows that's
17 pending.

18 The logic of all of the -- and incidentally, all
19 along the way we have kicked off -- punted this initial
20 pretrial conference or status conference 19 times. It's --
21 there's been a tacit agreement in the -- not a binding stay
22 of discovery, but a tacit agreement that it made sense to
23 resolve all those threshold issue before we got into
24 expensive and complicated discovery of mostly international
25 parties where issues -- international comity will become

1 quite relevant, present issues under the bank secrecy laws
2 of mostly Luxembourg and to some extent Switzerland and
3 perhaps some other places, I'm not sure where all the
4 defendants are.

5 But -- so the logic of not commencing this
6 expensive discovery is more relevant now than ever, applies
7 more now than ever. When we think -- and I don't mean to
8 presume to know how Your Honor is going to decide the
9 extraterritoriality motion, but most of the defendants in
10 this case we think are going to be out of this case very
11 soon.

12 We do have other jurisdiction motions and 12(b) (6)
13 motions that we would make at the appropriate time. And
14 I'll come back to whether we should just address that stuff
15 now. I think if there's a desire to get this case moving,
16 so to speak, the way to get this case closer to resolution
17 is, okay, we'll brief all those other issues, tee them up
18 for Your Honor, in case the extraterritoriality ruling comes
19 down in favor of the trustee or in case -- well as will be
20 the case, some defendants will definitely be left after
21 extraterritoriality; I don't deny that. But there are other
22 -- but my clients won't, number one. And number two,
23 12(b) (6) motions, we think on issues of failure to plead
24 good faith -- failure to plead lack of good faith, excuse me
25 --

1 THE COURT: From the perspective of the subsequent
2 transferees?

3 MR. KING: And from the perspective of the initial
4 transferees. There's no doubt that these were transfers for
5 value, this is just the return of the --

6 THE COURT: So the --

7 MR. KING: -- the parties' principal.

8 THE COURT: -- initial transferees are net losers
9 in this one?

10 MR. KING: The initial transferees are now losers.
11 So there would be issues of lack of good faith, and of
12 course the question of whether the trustee can go back six
13 years or two years will be relevant, also an important
14 issue, in terms of whose left in this case, how much are we
15 fighting over, et cetera.

16 THE COURT: Yeah, I -- you know, I'll hear
17 everybody. It just sounds like the way to deal with the
18 case most expeditiously is focus on the initial transfers.
19 Because if the initial transfers go away, everything else
20 goes away, right?

21 MR. KING: Well that is certainly true,
22 although -- yeah, that is certainly true, I suppose Your
23 Honor. We have, for obvious reasons I think, given who the
24 defendants are, the trustee has been quite focused on UBS as
25 a subsequent transferee.

1 THE COURT: Who were the initial transferees?

2 MR. KING: Two funds that are in liquidation in
3 Luxembourg -- or three funds, excuse me. Two in liquidation
4 -- four?

5 MS. JENSEN: Landmark and (Indiscernible).

6 MR. KING: Four funds, I apologize, Your Honor.

7 THE COURT: The Landmark Investment Funds --

8 MR. KING: My client's involved with three.

9 THE COURT: -- are the funds in 5311?

10 MS. JENSEN: That's correct. It's Landmark
11 Luxembourg Investment Funds in 5311 and in the Luxalpha
12 action it's Luxalpha and Groupement.

13 MR. KING: Luxalpha --

14 THE COURT: It's a big caption.

15 MR. KING: It's gotten --

16 THE COURT: I see, you put them on the end there.

17 MR. KING: -- it's gotten smaller, Your Honor,
18 actually over the years.

19 THE COURT: Maybe I shouldn't say anything.

20 MR. KING: Yeah, the case keeps whittling away
21 without Your Honor needing to take action, although we'd
22 love to see --

23 THE COURT: Certainly if the evidence goes away a
24 little also, right?

25 MR. KING: Well look, if the trustee was really

1 concerned about loss over evidence, the time to raise these
2 issues was probably five years ago, a long time ago.

3 THE COURT: So he lost the right to raise the
4 concern?

5 MR. KING: No. Look, they don't -- they lose the
6 right to say, that's really the issue. I think what's going
7 on here, Your Honor, is they realize a bunch of parties are
8 about to turn into nonparties and are trying to get
9 discovery in before Your Honor's dismissal ruling comes
10 down.

11 I recognize -- and I don't fault the trustee for
12 saying, look it's time to move this case along. The way to
13 move this case along, if we -- if there's a desire by the
14 trustee or by the Court, is to brief those other Rule 12
15 motions. I mean I guess we could assume we could address
16 them both to the existing operative complaints, although we
17 -- those seem to -- they seem to be abandoned in favor of
18 the proposed amended complaints that haven't yet been given
19 permission to file. We could address it to either or both.

20 THE COURT: Is there an objection for leave to re-
21 plead?

22 MR. KING: We objected to leave to re-plead on the
23 ground that the pleadings on extraterritoriality were
24 futile, as that was -- that's the procedural posture that's
25 pending before Your Honor, I think. And Your Honor's -- the

1 procedural order that's in place on the extraterritoriality
2 says we're going to defer all that stuff to a later date,
3 whether they get to amend, whether anybody objects to
4 amendment and other proceedings, we're going to adjourn to a
5 later date.

6 The reason -- one reason why commencing discovery
7 doesn't get us closer to resolution is the dates that are in
8 the proposed case management plans. And let me pause there
9 a second, we did agree -- we -- the trustee made a proposal
10 on the case management plan. We didn't think it was
11 appropriate to enter a discovery schedule, but we undertook
12 to resolve and address some issues that were in the
13 trustee's original proposal, and that's what's reflected
14 before Your Honor.

15 So in form, and in concept, we're fine with the
16 concepts embodied in that. Whether that commences now or
17 awaits resolution of the Rule 12 motions,
18 extraterritoriality, jurisdiction, 12(b)(6), is very much in
19 dispute.

20 THE COURT: Although, it doesn't --

21 MR. KING: But --

22 THE COURT: -- sound look they're years off when
23 you say resolution.

24 MR. KING: Look, but we can brief the Rule 12
25 motions now, if that's what is desirable. I think it has

1 always made sense, and agree that it was smart to brief
2 these issues step by step, resolve them, see if the -- see
3 what the case looked like after each step, whether -- who's
4 left, what issues are left, how much in transfers are left,
5 and then go forward.

6 But if we want to tee up those issues so that when
7 Your Honor decides extraterritoriality, that the red -- the
8 next issues are there before Your Honor, we can do that.

9 The other -- and I guess what I would say is, the
10 schedule that you'll see in the case management plans, the
11 deadlines run from decisions on those Rule 12 motions,
12 commencing discovery now doesn't get us closer to finishing
13 this case.

14 THE COURT: Well what's the difference if you
15 don't -- if the deadlines don't run until the commence --
16 until the resolution or the disposition of the Rule 12
17 motions?

18 MR. KING: Till the disposition of the last of the
19 Rule 12 motions.

20 THE COURT: All right. I've got --

21 MR. KING: And --

22 THE COURT: Go ahead.

23 MR. KING: -- lastly, Your Honor, just one other
24 thing. Because much of the discovery is overseas, we have
25 proposed, again, if there's a desire to move along, that the

1 parties be permitted, the trustee really, be permitted, but
2 all parties be permitted, to issue letter -- have letters of
3 request issued through The Hague Convention. As long as
4 we're waiting for Your Honor's decision on
5 extraterritoriality, yes, that letters of request process
6 will take time, but, you know, let's get it started and so
7 we don't have complaining about having wasted that time.

8 We very much think that Hague Convention discovery
9 is the right way to go, because of issues that I -- it's not
10 -- I don't think they're before Your Honor here today, but
11 there are bank secrecy and other privacy regulations in
12 Luxembourg where most of the documents are, Switzerland
13 where some of the documents are. And proceeding by The
14 Hague Convention avoids putting parties in, you know, in a
15 Catch-22 situation where they run the risk of civil or
16 criminal sanctions by complying with discovery orders here.

17 Your Honor doesn't have to decide that that is the
18 method that will be applied here. All I'm saying is, if we
19 want to move along, let's do that. Let's get -- you know,
20 have those go off into the bureaucratic process and see what
21 comes back and see what happens, while we do all the other
22 things that we agreed to do all along, resolve
23 extraterritoriality, resolve jurisdiction and resolve
24 12(b)(6) motions.

25 THE COURT: Thank you.

1 MR. KING: Thank you, Your Honor.

2 THE COURT: Anybody else want to be heard?

3 MS. JENSEN: Can I just respond on a few points,
4 please?

5 THE COURT: Yeah.

6 MS. JENSEN: Just two points briefly, Your Honor.
7 I think even if the initials were dismissed, we still have
8 the issue of their claims and resolving their claims. And I
9 think discovery will be relevant to that point as well, and
10 again, I don't see a difference -- I can't conceptualize a
11 difference between the good faith discovery at issue in the
12 litigation, and the discovery that we would -- that the
13 trustee would require to adjudicate these claims.

14 And it's -- I'm sorry, 272,000 by LIF and I think
15 I misspoke before, I just want to correct myself, 260
16 million by LIF and 762 million, Luxalpha.

17 And the second point, we believe that we're
18 entitled to proceed under the federal rules, The Hague -- we
19 may get decisions on all these motions before we got
20 documents through The Hague. Thank you.

21 THE COURT: You know, the question I have here is
22 I haven't heard anything that really affects the initial
23 transfers or the claims resolution process and it strikes me
24 that most of this discovery, other than the amounts actually
25 paid to the subsequent transferees or the alleged subsequent

1 transferees. It's going to be relevant, it isn't going to
2 go away. So why not start the discovery now?

3 MR. KING: Well the -- sure.

4 MR. MOORE: Good morning, Your Honor. Brett Moore
5 from Porzio, Bromberg & Newman on behalf of the liquidators
6 for the Luxalpha and Luxembourg Investment Fund. And just
7 to be clear, Your Honor, we do have pending -- as alleged
8 initial transferees, we have pending, right now, motions to
9 dismiss based on personal jurisdiction as well as forum non
10 conveniens. And we do intend to bring substantive 12(b)(6)
11 motions on what Mr. King's --

12 THE COURT: You're an initial transferee that
13 invested in BLMIS, how are you going to get a dismissal on
14 those grounds?

15 MR. MOORE: Well, Your Honor, it's -- the service
16 providers that were operating with these funds, we believe,
17 were the parties that were taking the steps and filed the
18 claims and dealt with Mr. Madoff and BLMIS.

19 THE COURT: But weren't they acting as your agent?

20 MR. MOORE: Yes, Your Honor. And you get into the
21 question of whether they were acting within the scope of
22 their --

23 THE COURT: But you were investing in BLMIS,
24 right?

25 MR. MOORE: The funds invested -- the fund's

1 proceeds were invested in BLMIS.

2 THE COURT: Okay. You represent the initial
3 transfer -- the invest -- the BLMIS customer and the initial
4 transferee then.

5 MR. MOORE: Correct, Your Honor.

6 THE COURT: So how can those claims be dismissed
7 on forum non conveniens grounds or personal jurisdiction
8 grounds?

9 MR. MOORE: They may not be dismissed Your Honor,
10 but we have -- we believe the arguments are strong, forum
11 non conveniens. There are pending cases in Luxembourg
12 involving a lot of these same parties right now.

13 THE COURT: But these are SIPA claims of
14 fraudulent transfers. Look, I haven't read any papers, I
15 just -- that sounds like a difficult argument to make.

16 MR. MOORE: But --

17 THE COURT: If you want to argue that the
18 complaint doesn't allege bad faith, maybe it's just a red
19 flag case, I don't know what it says, that's something else,
20 but --

21 MR. MOORE: But exactly, Your Honor.

22 THE COURT: But you still have your claims in here
23 as part of the claims resolution process, don't you?

24 MR. MOORE: That's correct, Your Honor. But with
25 respect to the safe harbor of 546, the good faith issues, we

1 believe that those things should be presented before the
2 Court and decided before we engage in discovery.

3 THE COURT: Tell me why. What's the difference
4 between the discovery relating to claims -- the claims and
5 discovery that might be relevant to whether or not you
6 received transfers?

7 MR. MOORE: Well because if Your Honor -- if the
8 good faith under the fraudulent transfer action is going to
9 be duplicative of whether these claims should be equitably
10 subordinated. So if the trustee has not proven that these
11 claims should be -- that he can proceed with a fraudulent
12 conveyance claim, I would submit then, therefore there is no
13 basis, at this point in time, to suggest that there should
14 be a substantive -- an equitable subordination either.

15 And I believe if we go back to Judge Rakoff's
16 ruling, he essentially had indicated that the two standards
17 would be the same in both of those instances.

18 THE COURT: Which two standards?

19 MR. MOORE: Under --

20 THE COURT: Bad faith and equitable subordination?

21 MR. MOORE: Correct, Your Honor.

22 THE COURT: All right.

23 MR. KING: Your Honor, I had one -- I'll -- one
24 question you asked was how is the discovery going to be
25 different. From the perspective of every defendant here,

1 who will be the focus of the trustee's discovery, the
2 discovery will be different, we'll be third parties. In
3 that circumstance they will have to go through The Hague
4 Convention, for sure. And we don't think they should get
5 discovery of us as a party simply because of the way this
6 has dragged.

7 THE COURT: I grant you it's easier when you're a
8 party, but at the end of the day, and this sounds like a
9 document case at least from the subsequent transferee's
10 point of view, how is it going to be different?

11 MR. KING: From a document point of view, the
12 scope will be somewhat similar. But giving us the
13 protection of The Hague Convention is a huge --

14 THE COURT: So -- well --

15 MR. KING: -- difference. It avoids putting us in
16 that -- between the rock and the hard place, and
17 accommodates international -- well, it accommodates
18 international comity, if Your Honor -- if we are parties.
19 If we aren't parties, having them go that route gives us the
20 protection we need to produce documents through that process
21 without fear of penalty in those foreign jurisdictions. And
22 they -- so they can get the discovery they'll need.

23 THE COURT: So you're suggesting that the document
24 discovery is all right, but they should do it through The
25 Hague Convention?

1 MR. KING: I'm -- look, I don't know that they
2 really need to kick this off, if the deadlines aren't for
3 210 days after the last of the Rule 12 motions is decided.
4 If the deadlines are that far out, we're not getting any
5 closer to resolution of this case by letting them commence
6 discovery now. We're just giving them a whole lot longer
7 period to take that discovery. So I don't think it's
8 necessary. But if there's a desire to not sit around
9 waiting -- you know, to do something while we're sitting
10 around waiting, then that's one option.

11 THE COURT: Yes, sir?

12 MR. PACCIONE: Your Honor, Anthony Paccione,
13 Katten Muchin for the Access defendants and also one of the
14 initial transferees, Groupement Financier.

15 Groupement did not file a claim, so the rationale
16 on the arguments with respect to --

17 THE COURT: Hold it down, please. I'm sorry. Go
18 ahead.

19 MR. PACCIONE: Groupement did not file a claim and
20 so the issue of discovery with respect to it and its claim
21 and need to understand whether or not it should be
22 subordinated or not, I think is not relevant to Groupement
23 and that would narrow the focus of any discovery going
24 forward. So for those reasons, Your Honor, I don't think
25 that the discovery -- and for the reasons that UBS fully

1 articulated, I think it's premature to have discovery. I
2 think a staggered approach, which we've adopted for the past
3 six, seven, eight years is still -- still makes sense.

4 THE COURT: And tell me what the problem is with
5 getting documents through The Hague -- or going through The
6 Hague Convention, other than it's more cumbersome.

7 MR. ZEBALLOS: Your Honor -- Your Honor, Gonzalo
8 Zeballos for the trustee.

9 The big difference is that the protections that
10 Mr. King was talking about are not -- he's saying they're
11 protections that would allow them to produce the documents,
12 but as you know, The Hague Conventions allows defenses under
13 local law that he would not get under the Federal Rules of
14 Civil Procedure.

15 So when he's saying they'd be allowed to produce
16 the documents, but they could turn around and say, no, you
17 get Luxembourg bank secrecy without the balancing test that
18 we would get here --

19 THE COURT: But in the meantime, if they don't get
20 out of the case that may be their problem, not your problem,
21 if they don't produce the documents.

22 MR. ZEBALLOS: If they don't get out of the case,
23 that's correct.

24 THE COURT: All right. But so -- all I'm
25 suggesting is these things can go along in parallel.

1 MR. ZEBALLOS: That is right.

2 THE COURT: All right. Look, I'll permit the
3 discovery through The Hague Convention. It sounds to me
4 like this -- the fastest way to streamline this case is to
5 determine whether or not the initial transfers are avoidable
6 or to the extent to which they may be avoidable. We've had
7 a lot of motions to dismiss in this case on those issues,
8 while I'm not looking forward to another one, that seems to
9 -- the way to challenge it.

10 You know, motions to dismiss, based on personal
11 jurisdiction, that's going to probably require trial -- a
12 trial. Forum non conveniens, it's -- it can certainly be
13 part of a motion to dismiss, but in the interim, the
14 extraterritoriality motion will move along, but it just
15 sounds like that's the fastest way or maybe the most
16 efficient way to deal with this case, to press the 12(b)(6)
17 motions directed at the initial transfers.

18 MR. KING: I guess the only thing I would --

19 THE COURT: I'm not ordering you to do it --

20 MR. KING: Yeah.

21 THE COURT: -- but that's -- it sounds like --

22 MR. KING: The only thing I would say is just --

23 THE COURT: -- it makes more sense than going

24 through seriatim briefings of forum non conveniens --

25 MR. KING: Sure.

1 THE COURT: -- personal jurisdiction, comity,
2 whatever else you have.

3 MR. KING: I'm throwing this out there as opposed
4 to advocating it, but the good faith/bad faith of the
5 subsequent transferees is really the same issue as --

6 THE COURT: Well no, because if the initial
7 transfers are not avoidable the whole case goes away.

8 MR. KING: Yes. But I guess I'm suggesting --

9 THE COURT: Except for the claims resolution.

10 MR. KING: -- that the -- one reason the initial
11 transfers aren't avoidable is because they haven't
12 adequately pled the lack of good faith of the initial
13 transferees. And they're going to use the state of mind of
14 the service providers -- look, we can talk about it --

15 THE COURT: All right.

16 MR. KING: -- Your Honor and come up with a
17 proposal, but --

18 THE COURT: It may be that your state of mind is
19 the state of mind of the initial transferees, because you
20 were the service providers. I understand that.

21 MR. KING: They're going to take that position.

22 THE COURT: All right. So, I don't have a problem
23 with that.

24 MR. KING: Yeah.

25 THE COURT: It just sounds like a way to deal with

1 the case, rather than go through this waterfall of motions
2 to dismiss, that's all. I'm not saying you won't have to do
3 that, but it sounds like it makes more sense to start at
4 that point.

5 MR. KING: All right.

6 THE COURT: So you can submit an order which
7 permits you to proceed with discovery under The Hague
8 Convention, I guess document discovery at this point. And
9 as I've said, if it turns out they remain parties, and they
10 assert bank secrecy or something like that, which was
11 similar to what happened in the Appelbaum situation, that
12 may be their problem.

13 MR. KING: Thank you, Your Honor.

14 MS. JENSEN: Thank you, Your Honor.

15 THE COURT: All right. Thank you. Thank you very
16 much.

17 (Whereupon these proceedings were concluded at
18 10:47 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

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